DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Rockville, MD 20857

June 20, 1995

NOTE TO CRAIG VANDERWAGON

Re: Incorporation of Title I provisions into the Alaska compact

The tribal organizations carrying out the Alaska Tribal Health Compact (ATHC) have requested that several sections of title I of the Indian Self-determination Act, as amended in 1994, be incorporated into ATHC and the associated annual funding agreements (AFAs). We have reviewed this request and find that some but not all sections of title I may be incorporated into a title III compact. The key is to look carefully at each section of title I to determine if the authority granted in that section is broad enough to encompass not only title I contracts, but title III compacts as well.

Initially we note that there is no provision in title III which authorizes incorporation of title I, at least in the broad sense urged by Mr. Bobo Dean in his memorandum dated May 8, 1995. We do not agree with Mr. Dean's analysis. Section 303(a)(6) of title III provides that each "annual written finding agreement" under a compact shall:

> *** provide for payment by the Secretaries to the tribe of funds from one or more programs, services, functions, or activities in an amount equal to that which the tribe would have been eligible to receive under contracts and grants under this Act, including direct program costs, and for any funds which are specifically related to the provision by the Secretaries of services and benefits to the tribe and its members.

Mr. Dean would read this section as incorporating any section from title I which has a direct or indirect affect on funding. We do not agree. Section 303(a)(6) only requires that the funding transferred under the compact to the tribes for programs, services,

functions and activities be the same amount that would be transferred to them under a title I contract. In other words the funding amounts required by title I section 106(a)(1) & (2) would apply to funding under a title III contract. For example, if a tribe would be entitled to $100,000 for operation of a program under title I, the tribe would be entitled to the same amount if it chose to operate the program under a title III compact.

We do not believe that section 303(a)(6) brings in provisions in title I such as section 106(k) which concerns cost principles. This section deals not with how much a tribe will receive but how funds may be spent. This is so even taking into account sections 303(e) [requiring that, to the extent feasible Federal laws and regulations shall be interpreted in a manner which will facilitate agreements under title III] and section 303(f) [likewise requiring interpretation which will facilitate the inclusion of activities, programs, services, and functions in the title III compacts]. In the present context these two sections require only that the IHS interpret laws and regulations in such a way that facilitates, or makes easier, the inclusion in title III compacts of activities, programs, services and functions and the funding associated with each.

We also note that many of the sections in title I are specifically made applicable only to a "self-determination contract". Referring again to section 106(k) for example, this section states that a tribal organization may expend "funds provided under a self-determination contract" for a specified list of purposes without Secretarial approval. The term "self-determination contract" is defined as follows:

> 'Self-determination contract' means a contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under title I of this Act between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law ***.

See 25 U.S.C. sec. 450b(j). This term then is specifically defined to encompass only title I contracts. There is no ambiguity in the definition and accordingly section 106(k) and other sections using this term provide authority only for title I contracts. These sections do not provide authority for the IHS under title III.

Other sections of title I are not limited to "self-determination contracts" but instead use terminology which may be read more broadly to include title III. For example, section 105(l) provides that the Secretary shall lease tribally owned property used "for the administration and delivery of services under this Act." We interpret this language to provide authority

for the Secretary to enter into leases under both title I and title III. Similarly where a section in title I is made applicable to a tribe while carrying out a "contract, grant or agreement" or other such language, the IHS may read that broadly enough to include title III.

In addition there are certain provisions in title I which only show up in the model contract required by section 108. This section requires use of the model contract in the case of each "self-determination contract" entered into under the Act. Any special provisions which are contained in the model contract therefore cannot be used as authority for the IHS to apply the same provisions to a title III compact.

Finally, it is significant to note that in giving permanent compact authority to the Department of Interior in title IV, Congress found it necessary to specifically make applicable certain sections from title I. Section 406(c) of title IV incorporates the provisions of sections 6, 102(c), 104, 105(f), 110, and 111. This incorporation is probably most significant in connection with the authority to transfer property found in section 105(f). This is another provision out of title I which on its face only provides authority to title I contracts. When Congress chose to extend this authority to compacts under title IV it did so explicitly. The same kind of explicit authority would have to be obtained before the IHS could rely on section 105(f) for authority to transfer the title to Federal property being used to carry out a title III compact.

With these thoughts in mind we suggest the following response to the specific amendments requested by the ATHC representatives:

1. Interest on late payment under the Prompt Pay Act (Chapter 39, title 31, United States Code). The IHS has no legal authority to agree to this amendment. The authority for inclusion of the Prompt Pay Act comes from section 1(b)(6)(iii) of the title I model agreement. As we noted above, provisions in the model contract do not provide authority under title III. The Federal government is not liable for the payment of interest in the absence of an express waiver of sovereign immunity by Congress. The waiver must be express (not implied or the result of ambiguous language) and will be strictly construed. Library of Congress v. Shaw, 106 S.Ct. 2957, 2963 (1986). Only Congress may waive the sovereign immunity of the United States. Thus, the Director of the IHS has no legal authority to agree to extend application of the Prompt Pay Act to self-governance compacts and annual funding agreements without additional legislative authority.

2. Audits. Section 106(k) cannot serve as legal authority to override or make exceptions to Circular A-87 with respect to cost principle applicable under the compact. As pointed out above this section only applies to title I and does not provide authority for

the IHS to vary from the usual cost principles imposed by OMB Circular A-87. We suggest that the language we agreed to last year and currently in the ATHC be left unchanged. We note that the OMB published a new version of A-87 on May 17, 1995 which is effective September 1, 1995. The new Circular allows most of the items contained in section 106(k). The existing language in the ATHC is sufficient to allow applicability of this new circular as well as any letters of waiver, Agency pre-approval or any other flexibility permitted within the scope of the circular. The IHS may pre-approve items of cost where allowability depends upon agency approval. However, exceptions to the Circular must be approved by the OMB.

3. Property. Additional legislative authority is needed for the IHS to agree to adopt the amendments proposed by the ATHC. As we pointed out above the title transfer provisions of section 105(f) do not provide authority for property transfer under title III. The other property provisions taken from section 108 are similar to provisions already in the ATHC, but again section 108 cannot provide authority to agree to these changes. The existing language should be left intact.

4. Leasing. The amendment requested may be agreed to since section 105(l) applies to title I and title III.

5. Applicable Federal Regulations. Representatives of ATHC have suggested changes to this section referencing section 107 of title I. The amendment would subject all regulations promulgated by the Secretary to the restrictive regulatory provisions of section 107. This proposed amendment goes way beyond section 107(a) and thus, cannot be agreed to. Section 107 provides limited authority for the Secretary to promulgate regulations relating to "self determination contracts" under title I. Any regulations adopted must be promulgated according to negotiated rule making procedures. These regulations, and the special restrictions on promulgation of them, would not generally apply to title III or for that matter, to any other programs administered by the Secretary.

Nevertheless, as we have pointed out above, some sections in title I may be applicable to a title III compact. It would then follow that any regulations promulgated to implement such a section of title I would be applicable to a title III compact. For example, the leasing provision of section 105(l) is applicable to title I and title III. Any regulations promulgated to carry out this section should therefore apply to a title III compact. Instead of the amendment to "Applicable Federal Regulations" suggested by ATHC we recommend the following:

> To the extent that any section of title I of the Indian Self-determination Act is, by its own terms or in some other manner, made applicable to self-determination compacts under title III, regulations promulgated

pursuant to section 107 of the Act to implement such section are considered "applicable" Federal regulations.

6. Waiver of Federal Regulations. The original language on waiver was negotiated last year after much discussion and should remain the same. The Act provides authority in section 107(e) to waive "regulations promulgated to carry out this Act." This does not provide authority to waive other regulations. We have suggested language at the negotiations in Anchorage that ties in this waiver authority (section 107(e)) to the extent that regulations are developed under section 107 for a Title I provision that is incorporated into the compact. For example, if regulations are negotiated and promulgated governing the leasing provision in Title I and that provision is incorporated into the compact, then those regulations promulgated under section 107 governing leasing and thus applicable to the compact could be waived under section 107(e).

It has also been suggested that the IHS agree to an additional factor which must be considered in the course of considering a written request for waiver. The proposed language, having to do with deciding whether waiver is even necessary considering sections 303(e) and (f), has been agreed to at the Anchorage negotiations.

7. Supply Sources. The IHS may agree to accept the amendment suggested because section 105(k) applies to both title I and title III, but only to the extent that it covers Federal sources of supply including lodging providers, airlines and other transportation providers. The IHS should not agree to add "including the use of Interagency Motor Pool vehicles" because the provisions relating to the use of motor pool vehicles comes from the model contract. On the other hand the IHS could agree that the Secretary will authorize the co-signors to obtain interagency motor pool vehicles. The only difference is that the model contract requires such authorization, whereas the Secretary should be able to authorize motor pool use for a title III compact tribe. In any event the tribe will still have to deal with GSA as any other user would have to do.

8. Federal Tort Claims Act. The IHS may agree to the amendment suggested by ATHC.

9. Use of Federal Employees. The IHS may agree to the amendment suggested by ATHC.

Finally, Bristol Bay Area Health Corp. has asked to amend the language in its current annual funding agreement to adopt the special rent-setting provisions of section 105(n). The IHS should not agree to this amendment. Section 105(n) as currently written applies to rental rates for Federal quarters pursuant to a "self-determination contract". As we pointed out above this terminology means that the section does not apply to title III. A legislative

change will be necessary in order for title III tribes to take advantage of this provision.

We hope this analysis is helpful. If you have any questions, please advise.

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cc: G.H. Ivey, Alaska Area Director